

NO. 67314-9-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON

Respondent

v.

ABRAHAM MACDICKEN,

Appellant

BRIEF OF RESPONDENT

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I. ISSUES

1. Did the defendant have automatic standing to challenge the search of a stolen computer laptop bag as that search related to two counts of first degree robbery?

2. Did the defendant have a legitimate expectation of privacy in the stolen computer laptop bag as a challenged search related to two counts of first degree robbery?

3. Was the search of the stolen computer laptop bag a valid search incident to arrest for first degree robbery?

II. STATEMENT OF THE CASE

A. THE ROBBERY.

Krystle Steig was working as an escort out of the Extended Stay America hotel in Lynwood in June 2010. She lived with Thomas Brinkly, who provided security for her when she set up dates. Steig's normal procedure was to set up dates through an internet advertisement. The date would be set up some time after a call for a date was received. Shortly after the client arrived Steig would notify Brinkly that there was no problem. If Steig failed to do that Brinkly would go to the room to make sure that she was all right. 1 RP 44-45,110-111.

Steig and Brinkly were also heroin users. On June 8 they were out of drugs so Steig deviated from her normal procedure. When the first call of the day came in she made an appointment for right away. The defendant, Abraham MacDicken showed up for the appointment. When Steig opened the door she noticed the defendant was acting strange. Steig tried to greet the defendant, but he just walked in the room and started looking around. He then turned around and pointed a gun at Steig, ordering her to lie face down on the bed. Steig was scared and began to cry. The defendant told her to stop crying or he would shoot her. The defendant asked Steig for her purse as he was rummaging around the room. The defendant took Steig's and Brinkly's property, including her laptop computer, cell phone, wallet and credit cards. He then tied her up with her cell phone cord and left. 1 RP 47, 50-55, 78.

Brinkly had left the room when Steig set up the appointment with the defendant. Although he did not get a text message from Steig, he did get a message that caused him concern for Steig's safety so he started back up the stairwell to check on her. While he was on the stairwell he saw the defendant coming down, carrying Brinkly's suitcase. Brinkly was surprised so he did not challenge

the defendant until after the defendant had passed. Once he passed, Brinkly told the defendant that the defendant had Brinkly's suitcase. The defendant denied having Brinkly's suitcase, and walked on. When Brinkly again challenged the defendant, he turned around and displayed a gun to Brinkly, telling him to come over. Brinkly chose to run the other way. 1 RP 111-114.

Brinkly ran back to the room he shared with Steig. When he got there Steig was hysterical. Brinkly looked out the window to make sure the defendant drove off. After Steig calmed down and Brinkly saw the defendant drive away they called the police. 1 RP 56-58, 115-117.

Officer Cornett and Detective Adams met Brinkly in the hotel parking lot. Brinkly was agitated when telling the officers what happened. Cornett went to Steig and Brinkly's room. There he saw a phone charger cord that was tied in knots and broken in the middle. 2 RP 200-204, 296-297.

Steig and Brinkly identified the defendant from still photos taken from a security tape police obtained from the hotel. Later they identified the defendant in a photo line-up. Police were not able to locate the defendant until the next day. The next morning police traced Steig's cell phone to the Traveler's Inn in Edmonds by

“pinging” it. The manager of that hotel confirmed that a known associate of the defendant had checked in the hotel. When police learned that the associate had a warrant for her arrest they went to the room she had registered in and arrested her on the warrant. She told police that only two girlfriends were in her room, and the defendant was not there. 2 RP 223-231, 244, 300-306.

As police were escorting the woman to their car in the parking lot they saw two women who had been in the arrested woman’s room walking quickly to the arrested woman’s car. Detective Adams went to talk to the two women while Detective Gillebo stayed with the woman who was in custody. While Adams talked to the two women Gillebo learned that the agency that had warrants for the woman they had arrested was unable to take custody of her, so Gillebo released that woman. 2 RP 232-233.

While Adams was talking to the two women he learned that one of them had a warrant for her arrest. As he prepared to arrest the woman, Officer Reorda arrived. Just as Reorda arrived Adams saw the defendant walking out into the parking lot pulling a rolling duffle bag and carrying a computer bag. Adams and Reorda ordered the defendant to the ground at gunpoint. The defendant put down the bags and got to the ground. Gillebo then put the

defendant in handcuffs. Gillebo then patted the defendant down and found Steig's cell phone in his pocket. 2 RP 234-36, 307-309.

Gillebo read the defendant his Miranda rights and the defendant agreed to talk to officers. The defendant told Adams that he had been in the room with the three women at the hotel in Edmonds. The defendant admitted to going to Steig's room the day before to use her services. He admitted he had stolen several items from her including the laptop and the laptop bag he had with him when he was arrested. The defendant denied that he was a robber, explaining that he was a thief. The defendant denied possessing a firearm, or Steig's cell phone. 2 RP 309-312.

Gillebo stood the defendant up after patting him down. Gillebo then took the bags the defendant had and moved them about one car length away. Gillebo searched the computer bag. He found a .9 mm Kel Tec handgun that matched the description of the gun Steig had given. The bag also contained Steig's computer and letters that were addressed to Steig. Gillebo found a latent fingerprint on the gun. The print was later analyzed and determined to be the defendant's. 2 RP 237, 239-242, 268-270, 282-287.

Adam's re-interviewed the defendant at the police station. By this time the defendant claimed that Steig had given him the laptop computer and computer bag. The defendant claimed Steig did that because Brinkly did not like the defendant. 2 RP 315.

B. PRE-TRIAL MOTION TO SUPPRESS.

The defendant was charged with two counts of Robbery First Degree each with a firearm allegation and one count of Unlawful Possession of a Firearm. 1 CP 55-56. Prior to trial the defendant filed a motion to suppress the evidence of the laptop and firearm found during the search incident to his arrest. 1 CP 98-111.

Detectives Adams and Gillebo testified consistently with the facts outlined above. Adams testified that there were insufficient officers present to affect the arrest against the defendant and secure the females, so the females were left standing in the parking lot when the defendant was arrested. 4-28-11 RP 13-22, 35-44.

The defendant testified that the laptop bag belonged to him and that he had not stolen it. He admitted that he told Adams that he had stolen the lap top computer, but denied saying anything about the bag. 4-28-11 RP 4-5.

At the conclusion of the hearing the court denied the motion to suppress. The court found the defendant's testimony that he

owned the laptop bag and had not stolen it from Steig was not credible. The court further found Detective Adam's testimony was credible. 1 CP 60-61. The Court held the defendant did not have an expectation of privacy in the laptop bag and therefore the evidence was admissible against the defendant with respect to the charges of Robbery First Degree with firearm enhancements. 1 CP 67-68.

The court held the defendant had automatic standing to contest the search of the laptop bag with respect to the Unlawful Possession of Firearm offense. 1 CP 68. The court concluded that the search of the laptop bag was a valid search incident to arrest with respect to that charge.

At trial the defendant stipulated that he had previously been convicted of second degree robbery. 3 RP 359-360; 1 CP 51. The jury found the defendant guilty of two counts of First Degree Robbery and one count of First Degree Unlawful Possession of Firearm. The jury returned a special verdict finding the defendant was armed with a firearm at the time he committed the robberies. 1 CP 28-32.

III. ARGUMENT

A. THE DEFENDANT DID NOT HAVE AUTOMATIC STANDING OR AN EXPECTATION OF PRIVACY TO CHALLENGE THE SEARCH OF THE BAGS INCIDENT TO HIS ARREST AS IT RELATED TO THE ROBBERY CHARGES.

The Fourth Amendment and Article 1, §7 require a warrant to search and seize property subject to a limited number of exceptions. To determine whether a search requiring a warrant occurred under the Fourth Amendment the inquiry is whether the defendant possessed a “reasonable expectation of privacy.” State v. Myrick, 102 Wn.2d 506, 510, 688 P.2d 151 (1984). The inquiry under Article 1, § 7 is whether the State unreasonably intruded into the defendant’s private affairs. Id.

A defendant may contest the search if he has automatic standing to do so. State v. Zakej, 119 Wn.2d 563, 570 n.3, 834 P.2d 1046 (1992). A defendant has automatic standing to contest a search and seizure if (1) the offense he is charged with contains possession as an essential element of the charge and (2) the defendant was in possession of the contraband at the time of the search. State v. Simpson, 95 Wn.2d 170, 181, 622 P.2d 1199 (1980). This doctrine has been abandoned when the search is contested under the Fourth Amendment. United States v. Salvucci,

448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980). It remains viable for searches contested under Washington Constitution Art. 1, § 7. State v. Jones, 146 Wn.2d 328, 332, 45 P.3d 1062 (2002).

The defendant must meet both requirements in order to be afforded automatic standing to contest a search. Zakel, 119 Wn.2d at 569, State v. Hayden, 28 Wn. App. 935, 939, 627 P.2d 973, review denied, 95 Wn.2d 1028 (1981). Unlawful Possession of a Firearm meets the first requirement. Jones, 146 Wn.2d at 332. Since the defendant was in actual possession of the firearm at the time he was arrested, he meets the second requirement as well. He therefore did have standing to contest the search as it related to the Unlawful Possession of Firearm charge. As discussed below, the search was reasonable. The trial court did not err when it denied the defendant's motion to suppress evidence found as a result of that search.

Possession is not an essential element of First Degree Robbery. Hayden, 28 Wn. App. at 940-41. He is therefore not entitled to automatic standing to contest the search as it relates to the Robbery charges. Nor did he otherwise have standing to contest the search as it relates to the robbery charges.

A defendant does not have a legitimate expectation of privacy in stolen property. State v. Hayden, 28 Wn. App. at 940. Nor does he have a privacy interest in stolen property; a search of that stolen property is not an unreasonable intrusion under the State Constitution. State v. Cleator, 71 Wn. App. 217, 223, 857 P.2d 306 (1993), review denied, 123 Wn.2d 1024, 875 P.2d 635 (1994). Thus where there the challenged search involves stolen property, the defendant does not have standing to contest the search. Hayden, supra, Cleator, supra.

Here the evidence which the trial court found credible established that the computer bag had been stolen. Police had been told by the victim that her laptop computer had been stolen. At the time of his arrest the defendant confirmed that he had stolen the laptop computer bag and the laptop computer from the victim. 4-28-11 RP 50-51. Because he did not have a legitimate interest in either the laptop computer or the computer bag he may not contest the search of that bag.

Although the defendant points to his own testimony that he owned those items and they were not stolen, that makes no difference in the analysis. The Court does not review credibility determinations made by the trier of fact. State v. Camarillo, 115

Wn.2d 60, 71, 794 P.2d 850 (1990). Since the trial court found Detective Adam's testimony more credible than the defendant's testimony, evidence the bag was stolen controls the outcome of the question as it relates to the robbery charges.

B. THE SEARCH OF THE LAPTOP BAG WAS A REASONABLE SEARCH INCIDENT TO ARREST.

1. The Search Occurred Within The Defendant's Area Of Immediate Control.

A search incident to a lawful arrest is an exception to the general requirement that police obtain a warrant to search. State v. Smith, 119 Wn.2d 675, 678, 835 P.2d 1025 (1992). The exception is based on the need for officer safety and to prevent the destruction of the evidence of the crime of arrest. State v. Patton, 167 Wn.2d 379, 386, 219 P.3d 651 (2009). The scope of the search includes the arrestee's person and the area within which he might gain possession of a weapon or destructible evidence. Chimel v. California, 395 U.S. 752, 763, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), Arizona v. Gant, 556 U.S. 332, 129 S.Ct. 1710, 1719, 173 L.Ed.2d 485 (2009), State v. Valdez, 167 Wn.2d 761, 773, 224 P.3d 751 (2009). A police officer having probable cause to believe a suspect committed a felony may arrest the suspect without a warrant. RCW 10.31.100. The defendant does not challenge the

lawfulness of his arrest. Rather he argues the search exceeded the permissible scope of a search incident to arrest because he was handcuffed at the time of the incident and thus unable to reach the bags that were searched. BOA at 13.

It does not appear that any Washington cases have considered the permissible scope of a search incident to arrest in the circumstances presented here since Gant was decided. Other courts that have done so have found the scope of the search was permissible.

The Court found a search of a suspect's bag after the suspect had been arrested and handcuffed in a public place fell within the search incident to arrest exception in United States v. Perdoma, 621 F.3d 745 (8th Cir. 2010), cert. denied, 131 S.Ct. 2446, 179 L.Ed.2d 1216 (2011). There the defendant was arrested in a bus station after police smelled marijuana on him, lied to officers when he told them he had no identification, and ran from officers when it was clear he did have identification. Police searched his bag incident to arrest and found drugs Id. at 748. The Court found the bag was in the area the defendant may reach in order to obtain a weapon or evidentiary items where the bag was close by when it was searched, and the police did not know how

strong the defendant was. Id. at 750-751. The Court also found the defendant was not secured within the meaning of Gant simply because he was in handcuffs at the time of the search. The Court concluded that it was possible the defendant could have reached his bag while in a populated public area. Id. at 752-753, n. 6. Those facts rendered the search there different from Gant where the police searched a car while the defendant was secured in the back of a patrol car. Id.

The Court similarly concluded that police conducted a permissible search incident to arrest of a suspect's bag where he was arrested in a hotel lobby. United States v. Shakir, 616 F.3d 315 (3rd Cir. 2010), cert. denied, 131 S.Ct. 841, 178 L.Ed.2d 571 (2010). There the lobby was populated by at least 20 people, and police had reason to believe that several of the suspect's associates were in the vicinity. Id. at 319. Additionally the bag was searched nearly contemporaneous with the arrest for the stated purpose of preventing any weapons that may be in the bag from potentially being used against officers or innocent by-standers.

The Court found that handcuffing the defendant did not invalidate the justification for the search under Gant. The Court reasoned that whether the defendant was "secured" was one fact to

consider in determining whether the item or place searched was within the arrestee's reaching distance. Id. at 320. In addition, the Court concluded a rule that invalidated a search incident to arrest whenever an arrestee was handcuffed would be inconsistent with the holding in Chimel where justification for the search included preventing the arrestee from gaining access to items that could be used to "effect his escape." Id. quoting Chimel, 395 U.S. at 763. Finally, the Court recognized that handcuffs did not completely eliminate all possibility that the arrestee would gain access to weapons or evidence, or escape. Id. at 320-21.

The circumstances in Perdoma, and Shakir, are much like those in this case. The arrest occurred in the hotel parking lot, which is a public place. 4-28-11 RP 18, 20. Police used a high risk arrest procedure to arrest the defendant because they believed he was still armed with a firearm. 4-28-11 RP 20-21. The defendant was standing in the parking lot in fairly close proximity to him at the time the bags were searched. 4-28-11 RP 22.

Although the defendant had been placed in handcuffs, he was still mobile as there was no evidence that his feet had been secured. The police had reason to believe the defendant was armed because he had been involved in an armed robbery just the

day before. The defendant is a relatively large man, standing over 6' tall. 1 CP 126. Since police identified the defendant through their investigation, the inference was they were unfamiliar with him before the arrest. Accordingly they would be unfamiliar with his physical abilities, including whether he would attempt to escape. Under these circumstances it was reasonable to believe that the laptop bag and duffle were within the area the defendant could have reached shortly after he was taken into custody.

One other fact which courts have found significant in determining whether the item searched was within the defendant's grab zone is the presence of other persons; particularly those who might help the defendant escape. In both Perdoma, and Shakir the court considered the presence of other people in the area of the arrest and search as a fact which set the circumstances of those cases apart from those in other cases where other people were either not present or were securely detained. Perdoma, 621 F.3d at 753, n. 6, Shakir, 616 F.3d at 319.

The Court in Gant likewise noted that distinction between the facts in that case and those in New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981). The search in Belton was justified where there were four unsecured arrestees who were

suspected of committing drug crimes present at the time of the search. In contrast, there was no similar justification where the suspect and his associates were all securely detained and confronted by several officers. Gant, 129 S.Ct. at 1722.

Here the presence of other people that could assist the defendant in accessing the contents of the bags to either destroy evidence or escape also justified the search in this case. The three women in the parking lot had been in the hotel room with the defendant just prior to his arrest. At least two of the women had been associated with the defendant. The women remained unsecured and standing nearby in the parking lot because the officers who were present were all involved in the arrest. 4-28-11 RP 19, 21, 23-24, 36-.39. The women presented additional concern the defendant could reach his bags because of their association with the defendant. The women may have had motive to create a distraction in order to allow the defendant the opportunity to reach his bags and obtain weapons to effect his escape.

The defendant argues the justification to search the bags did not exist, relying on State v. Byrd, 162 Wn. App. 612, 258 P.3d 686, review granted, ___ S.Ct. ___ (2011), and United States v. Maddox, 614 F.3d 1046 (9th Cir. 2011). Neither of these cases is helpful to

the determination of the question presented because both differ factually from the present case.

In Byrd the Court upheld suppression of a search of a suspect's purse after an officer arrested her and put her in a patrol car. Byrd followed the reasoning in Gant, finding that once the defendant had been secured in a patrol car she had no ability to access her purse so the justification for search incident to arrest did not exist. Byrd, 162 Wn. App. at 617.

In Maddox the defendant was arrested for reckless driving. The arresting officer took the defendant's key chain and cell phone from him, and put them back in the defendant's vehicle. The defendant was placed in the back of the patrol car. At that point the parties agreed the defendant did not present a threat to officer safety and there was no threat of evidence destruction. Maddox, 614 F.3d at 1047. After the defendant was put in the patrol car the officer returned to the defendant's truck and retrieved the key chain and cell phone. The officer looked in a container that was attached to the key chain and found the suspected controlled substances. The officer also searched the interior of the car, finding more contraband. The Court found that placing the defendant in the back of the patrol car after handcuffing the defendant rendered the

search of the key chain container unreasonable because there was no possibility that the defendant could conceal or destroy the evidence in that container. Id. at 1048-49.

Byrd and Maddox are different from the present case because in each of those cases the defendant was secured in the back of a patrol vehicle. In neither case was there evidence of associates in the vicinity who were in a position to assist the arrestee in effecting an escape. Unlike the defendants in Byrd and Maddox the defendant here had the potential ability and opportunity to escape. The potential for escape included the possibility of accessing the bags in order to obtain a weapon to assist in escaping. Because under the circumstances in Byrd and Maddox the defendants were not likely to escape, nether case is relevant to the analysis here.

2. The Search Was Justified To Look For Evidence Of The Robbery.

A search incident to arrest may also be justified to search for evidence relevant to the crime of arrest. Gant, 129 S.Ct. 1719, State v. Wright, 155 Wn. App. 537, 230 P.3d 1063, review granted, 169 Wn.2d 1026, 241 P.3d 413 (2010). (But see, State v. Chesley, 158 Wn. App. 36, 239 P.3d 1160 (2010). where the Court held the

evidence of the crime exception did not independently justify the search incident to arrest) That justification for a search of the arrestee and his belongings derives from the common law. State ex rel. Murphy v. Brown, 83 Wash. 100, 145 P. 69 (1914).

The general rule is that, where a person is legally arrested, the arresting officer has a right to search such person, and take from his possession money or goods which the officer reasonably believes to be connected with the supposed crime, and discoveries made in this lawful search may be shown at the trial in evidence.

Brown, 83 Wash. at 105-06.

The defendant was arrested based on probable cause to believe he had committed a robbery. One of the items reported stolen in the robbery was a laptop computer. 4-28-11 RP 15-16. At the time of arrest the defendant admitted stealing both a laptop computer and a laptop computer bag. 4-28-11 RP 50-51. It was reasonable to believe that the laptop computer bag in the defendant's possession at the time of arrest was evidence of the robbery that was the basis of his arrest. It was also reasonable to believe the laptop bag contained the computer reported stolen in the robbery. Likewise, since the robbery occurred only the day before, it was likely that the bags searched contained other evidence of the crime, including the weapon used in the robbery.

Because both the computer and computer bag, and the gun were evidence related to the robbery, the search for those items at the time of the defendant's arrest was justified as a search incident to arrest.

IV. CONCLUSION

The defendant, who was arrested for robbery, does not have automatic standing to challenge the search of the laptop computer bag and rolling duffel in his possession at the time of his arrest because possession is not an essential element of that crime. Further, the defendant does not have a privacy interest in the stolen property. Therefore the search of the bags did not violate the defendant's rights under either the Fourth Amendment or Article 1, §7 as it relates to the robbery charge.

Because Unlawful Possession of a Firearm does include possession as an essential element of the offense, the defendant did have automatic standing to contest the search of the bags in his possession at the time of his arrest. The search was permissible because the bags were within an area of the defendant's immediate control at the time of the search. Officers were therefore entitled to search for weapons or evidence. The search was also justified because it occurred one day after the robbery so it was reasonable

to believe that the bags would contain evidence associated with the robbery. This is particularly so because the victim reported her laptop computer had been stolen, the defendant admitted stealing a laptop computer and the laptop bag, and the defendant had in his possession a laptop computer bag.

For the forgoing reasons the State asks the court to affirm the decision of the trial court denying suppression of evidence found in the bags as a valid search incident to arrest.

Respectfully submitted on January 24, 2012.

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January 24, 2012

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**Re: STATE v. ABRAHAM MACDICKEN
COURT OF APPEALS NO. 67314-9-I**

Dear Mr. Johnson:

The respondent's brief does not contain any counter-assignments of error. Accordingly, the State is withdrawing its cross-appeal.

Sincerely yours,

KATHLEEN WEBBER
Deputy Prosecuting Attorney

cc: Washington Appellate Project
Appellant's attorney

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I, the undersigned, declare under penalty of perjury under the laws of the State of Washington that this is true.
Snohomish County Prosecutor's Office
2514 Jan

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

THE STATE OF WASHINGTON,

Respondent,

v.

ABRAHAM MACDICKEN,

Appellant.

No. 67314-9-1

AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 25th day of January, 2012, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

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containing an original and one copy to the Court of Appeals, and one copy to the attorney for the appellant of the following documents in the above-referenced cause:

BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 25th day of January, 2012.



DIANE K. KREMENICH
Legal Assistant/Appeals Unit